

EXHIBIT I

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Adversary Case No. 08-01789-brl
- - - - -x
SECURITIES INVESTOR PROTECTION CORPORATION,
Plaintiff,
v.
BERNARD L. MADOFF INVESTMENT SECURITIES, LLC,
Defendant.

- - - - -x

United States Bankruptcy Court
One Bowling Green
New York, New York

January 13, 2011
11:18 AM

B E F O R E:
HON. BURTON R. LIFLAND
U.S. BANKRUPTCY JUDGE

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HEARING re Objection to Motion by Trustee to Approve Settlement
Agreement with Picower BLMIS Account Holders and Cross-Motion
to Adjourn Hearing and for Leave to Take Discovery filed by
Laurence May on behalf of Adele Fox. with hearing to be held on
1/13/2011 at 10:00 AM at Courtroom 623 (BRL) (Attachments: #
(1) Exhibit A - Fox Plaintiffs' Appellate Brief# (2) Exhibit
B - Fox Plaintiffs' Discovery Request).

Transcribed by: Pnina Eilberg

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P R O C E E D I N G S

MR. SHEEHAN: Good morning, Your Honor. David Sheehan with Baker Hostetler on behalf of Irving H. Picard, the Trustee for Bernard L. Madoff Investment Securities LLC.

MS. WANG: Good morning, Your Honor. Josephine Wang for the Securities Investor Protection Corporation.

MS. DAVIS CHAITMAN: Good morning, Your Honor. Helene Davis Chaitman of Becker & Poliakoff on behalf of what we've called the Marshall plaintiffs and other claimants whose claims have not been allowed by the trustee.

MR. MAY: Good morning, Your Honor. Laurence May of Cole Schotz, we represent Adele Fox and members of the Fox plaintiff class.

MR. DRUCKER: Good morning, Your Honor. John Drucker, also from Cole Schotz, also on behalf of the Fox plaintiffs.

MS. HARRIS: Good morning. Marcy Harris and William Zabel from Schulte Roth & Zabel on behalf of the Picower parties.

THE COURT: All right. Mr. Sheehan, it's your motion/

MR. SHEEHAN: Thank you, Your Honor.

As Your Honor knows, this is the return date of a motion made by the trustee, pursuant to Rule 9019, seeking the approval of a settlement made with the defendant Picower in connection with an adversary proceeding initiated in 2009.

The amount of the settlement is five billion dollars.

1 I think I should almost be able to sit down after saying that,
2 in terms of whether or not we've reached the lowest range of
3 reasonableness but I believe, in light of the objections that
4 have been filed; I'm required to make something of a record
5 here this morning, Your Honor.

6 As you know, there are only three objections, two of
7 them are very similar in nature and they suggest that we didn't
8 -- we took too much. There's another objection that said we
9 took too little and echoing a rhyme that we're all very
10 familiar with, I think the trustee got it just right.

11 I think what we've done here today is an advance with
12 regard to the customers and claimants in this case that is
13 significant. It is, indeed, a milestone and I'll get into that
14 in some detail later, Your Honor.

15 As Your Honor well knows, this is a not a hearing with
16 regard to the facts and the law. Your Honor is not going to
17 address or decide those. The issue is whether or not we have
18 indeed surpassed the lowest range of reasonableness and as I've
19 suggested I think we've far exceeded that.

20 Let me start first, if I may, with the background of
21 this matter and how it arrived here today. As I've noted, Your
22 Honor, we started with a complaint some time ago; thereafter
23 there was a motion to dismiss to which we responded. In that
24 complaint we initially alleged the amount due to be 6.7 billion
25 dollars and we went into some detail as to why we thought we

1 were entitled to receive that on behalf of the customers and
2 creditors of BLMIS.

3 Thereafter, during the course of further investigation
4 by the forensic accountants engaged in by the trustee, it was
5 determined that the full amount, full amount taken out by Mr.
6 Picower and related accounts that he had was 7.2 billion
7 dollars.

8 I should note at this point, Your Honor, that the
9 settlement today that we are offering to the Court, when
10 combined with the efforts that we, in concert with the U.S.
11 Attorney's office, will result in an overall settlement with
12 the Picowers for the entire amount of the money taken out by
13 Mr. Picower through those related accounts, 7.2 billion
14 dollars, all of which will be handled by Mr. Picard as the
15 trustee and as the special master for distribution to customers
16 in this case.

17 After those motions were filed subsequent negotiations
18 took place between the trustee's counsel and the counsel for
19 Mr. Picower. Sadly and tragically Mr. Picower died during the
20 course of those negotiations but they continued. And to say
21 that they were rough and tumble would be putting it mildly,
22 these are not easy issues and there are excellent attorneys on
23 both sides, I say that somewhat humbly but nonetheless.

24 We went ahead, as competent counsel which is part of
25 the 9019 inquiry and we did our job on both sides and we went

1 back and forth quite a bit. In the spring of 2010 we had
2 arrived at a point where we were close. We were at, as our
3 papers reflect, about 4.8 billion dollars. And it was at or
4 around that time when the Fox Marshall folks first arrived in
5 the form of a complaint that they filed down in Florida seeking
6 to institute a class action against the Picowers, which Your
7 Honor has very much familiarity with as a result of the motion
8 that was then brought, which resulted in a preliminary
9 injunction of that action, which I will also get into later.

10 At or around that same time, Your Honor, we reached
11 out, because if you were going to expend this type of money in
12 a settlement what you're looking for as a third party is what?
13 Closure. We're looking to end this. If we're going to
14 reimburse the estate these kind of dollars you're looking for
15 that.

16 In connection with that goal, we reached out to the
17 Department of Justice the Southern District of New York who
18 clearly was involved in a very active and major investigation
19 and prosecution of claims against the Madoff enterprises and
20 discuss with them what we were doing.

21 It was at that time that we got together, as it were,
22 and worked together as a team and I think the public is well
23 aware, as Your Honor is today, of the outcome of that team
24 effort which resulted in ultimately the 4.8 becoming five and
25 the balance of the monies being forfeited, as it were, by the

1 United States Attorney's office. Indeed, ultimately all the
2 money was forfeited and I will also get into that later.

3 So what we have, Your Honor, is this: We have, I
4 think, all of the makings of a 9019 motion. We have competent
5 counsel who have engaged in negotiations, issues that are not
6 without doubt. By way of example, one raised by my adversaries
7 here this morning by way of objection, is that somehow they
8 think we should be limited to the six year period and somehow
9 only 2.4 billion dollars should be sought by the trustee. That
10 by seeking five he somehow is seeking too much. Respectfully
11 we disagree; we think they're wrong on both the law and the
12 facts.

13 The law provides, the discovery rule in the State of
14 New York, that we can go back beyond the six year period so
15 long as indeed there is an innocent investor who we can bring
16 forth and establish the fact that through their own efforts
17 they could not have found out about the fraud until December of
18 2008 when Mr. Madoff came forward.

19 We believe that there are literally dozens of innocent
20 investors and respectfully we've suggested that Fox and
21 Marshall would suggest that they were innocent and indeed would
22 fulfill the criteria required under that statute.

23 Needless to say, there was a risk associated with
24 that, not a lot of law on it. We're very comfortable, as the
25 trustee's counsel, that we're right and we argued that back and

1 forth because the objectors are right, the six year number is
2 2.4 billion dollars. The other 4.8 billion dollars goes back
3 to 1983. The forensic accountants engaged in by the trustee
4 unraveled this fraud all the way back to its inception, beyond
5 1983. And starting in 1983, coming forward, we then found the
6 7.2 billion dollars that made its way back and forth through
7 those accounts ultimately into the hands of Mr. Picower and
8 these related accounts.

9 Therefore, there was risk associated with going
10 forward but on the other hand there were other things
11 confronting the Picowers and in terms of how they wanted to
12 approach this and needless to say that give and take resulted
13 in the settlement that's before you today. And I respectfully
14 submit, as I said at the outset, that we meet the criteria
15 established for 9019.

16 So what are those objections again? One objection
17 was, as I suggested that the Serabians suggest that we got not
18 enough. That if we got every cent that the Picowers put
19 through BLMIS we did not get enough. That somehow we should
20 have pursued profits and pursued other tracing of all these
21 monies going back to 1983 and look for that as well.

22 First of all, it's a settlement. I think the
23 settlement is an acknowledgement that you don't get everything
24 that you're looking for. On the other hand, in this particular
25 instance, I would submit to Your Honor, that getting 7.2

1 billion dollars is basically getting everything that we were
2 entitled to and going beyond that would have been beyond what
3 we were required to do and beyond what the trustee should be
4 doing in terms of working on behalf of the customers and
5 creditors.

6 So I believe that the Serabian objection is without
7 merit. The objections of Fox and Marshall offer a little bit
8 more detail. They suggest, as I've alluded to earlier, that
9 somehow we've asked for too much, that somehow we should not be
10 getting all of this money. That only 2.4 billion dollars
11 should be given to the trustee to go to the benefit of, as we
12 put it, the net losers or those with allowed net equity claims.

13 They're, again, wrong on the law and wrong on the
14 facts. Let me explain why I believe that to be so. First of
15 all, we have to go back to the beginning, as it were Your
16 Honor, and we've done this more than once in this case but
17 somehow we seem to have to revisit it to bring discipline and
18 clear thinking to what we're talking about here.

19 What we're talking about is the SIPC statute or SIPA
20 and under SIPA, as Your Honor well knows, there is a priority
21 of claimants and that priority goes back to the Chandler Act,
22 and we've talked about this on the record before, of those
23 customers who have a positive net equity in their account at
24 the time of the demise of the brokerage house.

25 In this particular case, because we are dealing with a

1 Ponzi scheme, a fact that many people seem to want to forget
2 and suggest that there were earnings and profits when there
3 were none, nonetheless what we're dealing with is a Ponzi
4 scheme. So in a Ponzi scheme what is left? What are we trying
5 to get by virtue of going after these dollars? We're trying to
6 get back other people's money and that's exactly what we were
7 trying to do here.

8 At this point I'd like to commend Barbara Picower
9 because what she recognized was after the fact, after this all
10 went down, when it became clear what Mr. Madoff was all about,
11 she stepped up and stepped up big time and gave to the trustee
12 and to the U.S. Attorney a total of 7.2 plus billion dollars,
13 every cent that the Picowers ever received out of this estate.

14 So why are they wrong then about the 2.4? Well,
15 they're wrong because all those monies are other people's
16 money. They are, in fact, the quintessence of customer
17 property. There is nothing in this case, because it is a Ponzi
18 scheme, except customers' property. There wasn't anything else
19 to be dealt with.

20 So what are we about here? Is there -- are we here,
21 on behalf of the trustee as his counsel, only focusing upon
22 that priority claim? Of course not. Should we, therefore, be
23 limited to that aspect of the case? Of course not. Our job
24 here is to fulfill the claims of everyone who has filed a claim
25 in this proceeding. Our goal, our goal and a worthy one, is

1 not only to get the twenty billion dollars that is due to all
2 the net losers in this case, and I submit to Your Honor we've
3 made a fair start by combining all of the monies to a total of
4 almost ten billion dollars to date, but we go beyond that.

5 Mr. Picard is not the trustee for just net losers or
6 those with allowed net equity claims. He is the trustee for
7 BLMIS and all of the customers and creditors. He indeed
8 represents Fox and Marshall who filed claims in this
9 proceeding. Who, because they got more money than they put in,
10 do not have a right to priority but do have a claim and so does
11 everyone else who's a net winner and so does everyone else who
12 is a net loser. All of them have a claim for fraud and all of
13 those are general creditors.

14 The goal here of this trustee is not just to get the
15 forty -- the twenty billion dollars back to satisfy that
16 priority and bring those people, those folks that are the net
17 losers, on a parity with the clients being represented by the
18 attorneys here today, the net winners.

19 We then have the net winners and net losers under the
20 priority of the statute together and they, in common, have
21 what? Correctly stated about a forty-five billion dollar claim
22 and it is the goal of this trustee to get every cent of that
23 back. He has filed claims here for ninety billion dollars and
24 it is our intention to not only recover the twenty billion
25 dollars that will satisfy all the net loser claims but in

1 addition to that as much money as we can to satisfy the claims
2 of all of the people here.

3 It's very, very important to understand that aspect of
4 the statute and to not isolate the trustee's efforts to those
5 of just net losers. The fact that the Fox Marshall claimants
6 did not -- one of them did get allowed actually but is looking
7 for more because they want the fictitious statement, issue for
8 another day in the circuit, and the other is the denied claim
9 as a net winner but both of them, both of them, have, assuming
10 that the trustee's successful in that equity, valid, general
11 unsecured creditor claims that will ultimately come before this
12 Court with a measure of damages for which we will respond to
13 the extent that we've created a general statement.

14 So for them to suggest that somehow we should be
15 limited to 2.4 or somehow the six year period circumscribes the
16 activities of this trustee is dead wrong. Wrong on the law and
17 wrong on the facts.

18 So where do we go from there? We go to the fact that
19 the trustee, at this point, has available to him the ten
20 billion dollars and he's looking for the other ten, he's going
21 to pay the rest of that to the losers, doesn't in any way
22 derogate from the fact that these claimants do have claims and
23 will be dealt with here. But not -- not to the derogation of
24 the net losers.

25 Let's follow through on the logic that is being

1 offered by Fox and Marshall. Their suggestion is 2.4 should
2 somehow just go to net losers and the balance should be
3 available to who? Net winners who, by definition, already have
4 the money of the net losers. That doesn't work in a Ponzi
5 scheme. Is that fair? Is that equitable? Is equity a quality
6 in the bankruptcy court? Of course it is, it is the foundation
7 upon which this Court rests. For them to suggest that somehow
8 there should be a carve out of these monies and they should
9 receive it when they're already sitting there with other
10 people's money as net winners when the net losers would not --
11 would not be made whole is totally inappropriate. Conflicts
12 not just with the SIPA statute but with basic principals
13 underpinning the bankruptcy code. How can that be permitted?
14 Of course it can't and quite frankly I don't think ultimately
15 that's what they're suggesting.

16 What they're suggesting is, is that somehow they
17 should be recognized. They too were victimized here and to
18 that the trustee absolutely agrees. Of course they were.
19 Everyone who relied upon those statements was defrauded, we're
20 not suggesting otherwise. We're not suggesting that they don't
21 have a claim; it's just not a priority claim. It's different.
22 It's a general unsecured claim.

23 And quite frankly, looking through that prism, Your
24 Honor, at the class action that exists down in Florida, that's
25 really not an appropriate class. They're trying to represent

1 just net winners, overlooking the fact that the net losers are
2 not only behind those net winners because they didn't get all
3 their money back, but they too have what, fraud claims. The
4 same fraud claims that they suggest they're advancing on behalf
5 of that class. Of course that class hasn't been certified and
6 I would suggest to Your Honor, for the facts I've just
7 suggested to you, it would never be certified because they
8 don't represent all of the people who suffer as a result of
9 this fraud. They're trying to represent a select -- carve them
10 out, reach out to them in a way that's inappropriate,
11 unsupported by fact and law.

12 The other aspect of their complaint here, Your Honor,
13 today which I'd like to go through very quickly, is the fact
14 that somehow our injunction is inappropriate. Your Honor, I
15 think one of the -- rather than go through a lot of the law
16 that's been cited here I want to just briefly go to Judge
17 Bernstein's decision in Dreier which, I think quite frankly, is
18 a wonderful opinion with regard to the law. It sets forth the
19 9019 principles and also the appropriateness of an injunction
20 with regard to a third party, as the Picower parties are.

21 And as Judge Bernstein teaches us, there are a couple
22 of elements that have to be in place here. One is, is that
23 Your Honor has to have subject-matter jurisdiction. I think
24 that's beyond cavil here but let's just walk through that.

25 Subject-matter jurisdiction not over the settlement

1 but over the claims that are being disputed here, the claims
2 that Fox and Marshall suggesting that they have that are
3 somehow "independent". They've offered nothing other than
4 theories and causes of action but nothing to suggest how their
5 claims do not relate to or arise out of this proceeding.
6 Indeed, there's a critical nexus between their complaints, as
7 evidenced by the fact that what did they do when they filed
8 their complaint? They copied that of the trustee practically
9 word for word.

10 What does that tell you? What they're seeking to do
11 is go after the same property of the estate that must be
12 protected here by virtue of this injunction so that this cannot
13 be interfered with in terms of the proper administration of the
14 SIPA proceeding. So subject-matter jurisdiction clearly vests
15 with Your Honor.

16 If we look at Metro Media, and Judge Bernstein did, it
17 talks about something that you do not have, third party
18 injunctions, unless you have uniqueness associated with the
19 endeavor. Again, as I said at the outset Your Honor, I believe
20 this is a unique and quite frankly great day for the customers
21 of BLMIS.

22 The ability to achieve a settlement of this magnitude
23 resulting in all of the money being sought by the trustee,
24 together with the U.S. Attorney's office coming back to all the
25 customers. I cannot think of a more unique setting where it

1 would be more appropriate, more appropriate to do what? Make
2 sure that this settlement is approved and arrived at in a way
3 that makes it work.

4 And one of the things that Ms. Picower is entitled to
5 and is also taught to us by Judge Bernstein and Judge, for some
6 reason my colleagues seem to think that Judge Batts (ph.) I'm
7 looking at wrong opinion -- I'm looking at the right opinion.
8 What Judge Bernstein suggested in there was that you can give a
9 third party the benefit of that injunction, why? Because if
10 they're going to step up in a way and make a significant, and
11 in this case very significant, contribution for the benefit of
12 the estate they should get the benefit of an injunction to make
13 sure that third parties don't come after them.

14 Now my colleagues have suggested that our injunction
15 is somehow too broad, too indefinite, too vague. Indeed that
16 was part of the problem in Dreier and again Judge Bernstein
17 gave us guidance and instructions on how to deal with that.
18 And what he suggested was is that the best way to deal with
19 that is to make sure that that injunction relates only to what?
20 Claims that belong to the trustee, claims that are derivative.

21 And Your Honor, I just impose upon you for one more
22 moment here to read into the record, because I think it is
23 significant, the injunction that we're seeking to achieve here.
24 And this injunction would apply as follows: "To any BLMIS
25 customer or creditor of the BLMIS estate who filed or could

1 have filed a claim in the liquidation, anyone acting on their
2 behalf or in concert or in participation with them or anyone
3 whose claim in any way arises from or is related to," words
4 right out of the statute, "to BLMIS or the Madoff PONZI scheme
5 is hereby permanently enjoined from asserting any claim against
6 the Picower BLMIS account holders or the Picower releasees that
7 is duplicative or derivative of the claims brought by the
8 trustee or which could have been brought by the trustee against
9 the Picower BLMIS account holders or the Picower releasees".

10 Your Honor, I think we've taken the teaching of Judge
11 Bernstein to heart. We indeed limit our injunction to
12 derivative claims, that which could have been brought by the
13 trustee. What's missing here isn't clarity. Clarity is self
14 evident. What's missing here is any offer by our adversaries
15 here to suggest that they do have an independent claim.
16 Everything they speak of is derivative of and arises out of the
17 Ponzi scheme of Mr. Madoff, that's clear. There's no privity
18 between Mr. Picower or any of his entities and any of these
19 parties. Their relationship to him orbits around necessarily
20 the Madoff PONZI scheme, that's all it does. The same dollars
21 that they're looking for are the same dollars that are now
22 being paid in to this estate.

23 Your Honor, in light of this I respectfully submit
24 that both of these objections should be overruled and that the
25 9019 should be approved.

1 One last thought, Your Honor. Certainly under these
2 circumstances there's absolutely no need for discovery here
3 today.

4 Thank you.

5 MS. WANG: Josephine Wang for the Securities Investor
6 Protection Corporation.

7 I'll keep my comments very brief, Your Honor. Our
8 position is fully set out in the brief that SIPC has filed. We
9 support the motion of the trustee. We commend the trustee and
10 its counsel on the result that they have achieved. If the
11 Court approves the settlement agreement it will benefit
12 thousands of Madoff investors.

13 Because we believe that the settlement is very
14 positive, we're extremely disappointed in the objections that
15 have been filed. We believe that the Serabians have failed to
16 appreciate the standards for approving a settlement. Those
17 standards are clearly met here.

18 We also believe that the Fox Marshall objections are
19 without merit. Basically they rest on two grounds, one that
20 the proposed injunction is too broad, in fact the parties can't
21 confer jurisdiction on the Court that it doesn't have and the
22 parties don't presume to do that. The injunction is clear on
23 its face, the Court plainly has jurisdiction to enter it. It's
24 limited to those suits that the trustee brought or the trustee
25 could have brought.

1 The other basis for their injunction or for their
2 objection rather is that the trustee is getting too much money,
3 that the entire five billion dollars is not customer property.
4 That's not the issue before the Court today, whether it is or
5 is not customer property but if the issue were before the Court
6 plainly it is customer property.

7 It's now well known today that what Bernard Madoff was
8 running was a Ponzi scheme and what that means is that the
9 money that was paid to investors represents other investors'
10 money.

11 Converted customer property is clearly within the
12 definition of customer property under the Securities Investor
13 Protection Act. Barbara Picower is doing the right thing.
14 She's returning what is now well known to have been stolen
15 customer property to the estate. We wish that the same thing
16 could be said of the -- or by Fox Marshall in the objections
17 that they filed.

18 It's important to remember that they have filed claims
19 in the SIPA proceeding. They are claimants. They have gotten
20 back their principal in the case. Ms. Marshall has gotten back
21 her principal in the SIPA liquidation but she's looking for
22 fake profits and that's why she has filed the Florida action.

23 Ms. Fox, while the firm was doing business, got 1.2
24 million dollars from the firm in fake profits. But she's
25 looking for more fake profits and that's why she has brought

1 her Florida suit.

2 But that's not the point of this SIPA proceeding,
3 because it's important to remember that what Ms. Fox has
4 gotten, what Fox Marshall are looking for are fake profits.
5 They are other investors' money.

6 This settlement has the potential to return to these
7 people whose money has been stolen who have not recovered their
8 principal. And yet, Fox Marshall would seek to prevent them.
9 They would seek to; instead, obtain more fake profits for
10 themselves at the expense of investors who have yet to recover
11 their principal.

12 We submit that that is not the right outcome. We
13 respectfully submit that the trustee's motion to approve the
14 settlement agreement should be granted.

15 Thank you, Your Honor.

16 MR. MAY: Good morning, Your Honor. Laurence May of
17 Cole Schotz on behalf of the Fox plaintiffs and Adele Fox.

18 Your Honor, I want to confine my remarks today to one
19 issue and that is the issue of the injunction. With respect to
20 the other issues, we're prepared to rest on the papers that we
21 filed in connection with this application and so I want to just
22 focus on the injunction, if may.

23 The main issue with respect to this injunction is a
24 pretty simple one. It can be, sort of, answered by a yes or
25 no.

1 THE COURT: So you don't think that the settlement is
2 too much?

3 MR. MAY: I'm resting on our papers. We --
4 whatever -- we said in our papers we thought the settlement was
5 inappropriate and I'd like to address the injunction.

6 THE COURT: You're not opining, at this point, orally
7 that the settlement is too much.

8 MR. MAY: Yes, we are.

9 THE COURT: You spent an awful lot of your paperwork
10 doing that.

11 MR. MAY: We spent a portion of it.

12 THE COURT: Well, I spent a good part of the night
13 dealing with it and I'm surprised you're not dealing with it
14 not but go ahead.

15 MR. MAY: Okay. So let me address the injunction
16 then, if I may.

17 THE COURT: Go ahead.

18 MR. MAY: And as I said, I think the issue with
19 respect to the injunction is a simple one and could, sort of,
20 be answered in a yes or no way and it simply is this: Your
21 Honor entered a decision in an order in May of 2010 in which
22 the Court held and ruled that the lawsuit that our clients had
23 commenced in Florida, the class action lawsuit, was to be
24 preliminarily enjoined on the grounds that the actions and the
25 causes of action set forth in that lawsuit were property of the

1 estate and that the commencement of that action was void ab
2 initio for that reason. That decision has been appealed to the
3 district court. It has been fully briefed and it's now before
4 Judge Codel (ph.).

5 The issue that we wanted to know and that we still
6 don't have clarity on is this, is if the District Court or the
7 Court of Appeals should determine that this Court was incorrect
8 in its analysis and that the claims that we asserted in the
9 Florida action are not property of the estate and that they
10 belong to our clients, if that should be the determination then
11 it is our view that the injunction here -- whatever injunction
12 here is entered today would not and should not prevent us from
13 pursuing that suit under those circumstances.

14 I do not know, based upon the pleadings, based upon
15 the proposed orders and based upon the remarks of counsel
16 today, whether in fact that is what's intended. For example,
17 without going into the pleadings and I'll go into those in a
18 moment, but last night at 8 o'clock the trustee filed a new
19 proposed order in connection with this application.

20 In the proposed order the trustee added a provision
21 that said, "Ordered based on the record before the Court, Fox
22 and Marshall whose claims against the Picower entities have
23 previously been preliminarily enjoined by this Court as
24 duplicative and derivative are and shall be bound by the
25 permanent injunction granted hereby".

1 I do not understand the consequence of that particular
2 provision if in fact it is determined by the Court and the
3 District Court or the Court of Appeals if this matter should be
4 appealed to a higher court, that if our claims are not property
5 of the estate, whether this injunction purports to stop us from
6 pursuing those claims.

7 If it does, this injunction is a classic third party
8 injunction and under the circumstances of this case, as set
9 forth in our papers, is an injunction which is improper and
10 should be granted.

11 If the injunction is intended solely to prevent us
12 from pursuing claims that we do not have, as determined by the
13 appeal, then we understand that and we don't have a quarrel
14 with that injunction. But we do not think -- we do not know at
15 this point whether that's in fact what is intended by the
16 language of this injunction.

17 And Your Honor, in the pleadings and particularly in
18 the reply papers that were filed in this case by the trustee
19 there is sufficient indications in those reply papers to say
20 that the injunction that is intended here is far broader than
21 the injunction that the remarks at times indicate but at other
22 times do not indicate.

23 For example, in his reply papers the trustee says at
24 page 10, "Given the ruling of the Court," that's the ruling of
25 May of 2010, "there can be no question that Fox and Marshall

1 would be permanently barred by the proposed injunction and they
2 will have to appeal the injunction if they are unhappy with the
3 result."

4 To me, that sounds like an injunction which is a broad
5 injunction, that it is not tethered to or in any way related to
6 the determination by the District Court or the Court of Appeals
7 as to who may own these claims and if that's in fact the case,
8 we believe it's an improper injunction.

9 One more point with respect to this proposed order,
10 and that is that there is a new provision added into the
11 proposed order which states, as a conclusion of law, and it may
12 be a combination of finding of fact or a conclusion of law, but
13 in any event the conclusion is that the Court has jurisdiction
14 to consider this matter and to consider the permanent
15 injunction.

16 Your Honor, we disagree with that statement for the
17 following reason; there is an appeal pending with respect to
18 the same issues which are covered by that injunction and that
19 is was the preliminary injunction proper and are the claims
20 that this Court found to be property of the estate in fact
21 property of the estate. Those two issues are squarely before
22 the District Court and under well established law when there's
23 an appeal pending, an appeal has been made from a particular
24 issue, it divests the Bankruptcy Court of jurisdiction over
25 those issues. So we don't believe that that's an appropriate

1 finding under the circumstances, at least as it applies to our
2 clients.

3 Your Honor, to the extent that this injunction is
4 intended to enjoin us from pursuing our own claims and claims
5 which are not property of the estate, it fails to meet all of
6 the requirements for third party injunctions as set forth in
7 Metro Media, as set forth in Johns Manville III and even
8 notwithstanding counsel's statements seemingly to the contrary
9 as Judge Bernstein ruled in Dreier.

10 Third party injunctions are rarely granted. They are
11 granted primarily, if not exclusively, in Chapter 11 cases.
12 The Second Circuit has warned in Metro Media that they are to
13 be granted only under very unique circumstances. They also
14 warned and said that making a financial contribution to a
15 particular matter is not in and of itself a sufficient basis
16 for a third party injunction. And in Manville the Second
17 Circuit squarely held that to the extent that property of the
18 estate is not directly affected, then there is no basis and no
19 jurisdiction for a third party injunction.

20 Now let's look at it in this case. The agreement that
21 was signed by the trustee, with the Picower defendants,
22 provides, among other things, that the agreement is affective
23 as between the parties if the forfeiture order in the District
24 Court is approved and there is no appeal from that order. And
25 my understanding is that the time to appeal from that order

1 runs on Monday. No appeals have been filed and I think it's a
2 fair observation to say that probably none will be filed from
3 that order.

4 That being the case, this agreement is effective
5 regardless as to whether this Court approves this 9019
6 application or not. The money that's the subject of the
7 settlement has already been put into an escrow account and when
8 that order becomes final that money will not go back to the
9 Picower defendants and the trustee has said that numerous
10 times.

11 The agreement also says that once that event happens
12 then the releases are exchanged between the parties. And once
13 the releases are exchanged between the parties then the trustee
14 gives up all claims that he has, in his own capacity, as
15 against the Picower defendants. Which mean -- which means that
16 they no longer have an interest in any residual monies or funds
17 that remain with the Picower defendants which means that there
18 is absolutely no impact on this estate with respect to the
19 pursuit of independent claims against the Picower defendants in
20 connection with what we believe to be our independent right and
21 our independent claims which we hope will be validated by the
22 appellate court but, you know, we'll have to see on that.

23 So for all of those reasons, Your Honor, we think that
24 to the extent that this injunction purports to enjoin
25 independent claims, claims that are not property of the estate,

1 it's improper. If this injunction, and we propose language in
2 our papers as to what would make sense, if the injunction is in
3 fact intended only to enjoin us from pursuing claims if it's
4 determined that we don't own those claims, well, you know,
5 that's an obvious one. If we don't own the claims we can't
6 pursue them anyway and an injunction is not really needed. But
7 if that's all that's intended here, we can understand that.
8 But if something more is intended here, and based upon the
9 language of the injunction, the language of the proposed order
10 and the allegations and the statements that have been made in
11 the pleadings, that is not a certainty.

12 So for that reason we have -- we are asking for
13 specific language to understand where we stand. If we can't
14 get that language and this issue remains vague such that
15 someone in a subsequent proceeding could claim either that
16 we're in contempt or that we are prohibited from pursuing these
17 claims because they are subject to a permanent injunction,
18 we'll have to exercise remedies in that case.

19 THE COURT: What do you mean by that?

20 MR. MAY: Well, we'd have to appeal.

21 THE COURT: Well, why don't you come out and say it.

22 MR. MAY: Okay. I just did. Sorry about that.

23 THE COURT: All right.

24 MR. MAY: So, you know, but we don't think that's
25 necessarily how this thing should go.

1 THE COURT: Of course that would put a halt to a
2 distribution of some 7.2 billion dollars.

3 MR. MAY: It's --

4 THE COURT: That's a very, very careful thing you
5 would have to think about before --

6 MR. MAY: I'm sorry, Your Honor. I don't hear you.

7 THE COURT: I think we're talking about a lot of
8 money, a lot of impact on a lot of people with delay.

9 I just want to point out that there --

10 MR. MAY: Our appeal --

11 THE COURT: May I finish? I have allowed you to talk
12 without saying anything.

13 MR. MAY: I apologize.

14 THE COURT: Although I disagree with a lot of the
15 points that you made, but that's beside the point.

16 THE COURT: Although I disagree with a lot of the
17 points that you made, but that's beside the point.

18 Clearly there's been undue delay here and the Court is
19 concerned over the fact that this delay has also foisted the
20 possibility and probability and the actuality of victims being
21 made victims again based upon the delay that's here. And I'm
22 speaking specifically now of the fact that vultures are making
23 offers to purchase claims based upon delay and those offers
24 have caused victims to cash in for very de minimis amounts in
25 the face of the expectation of a rather large recovery here.

1 All I'm expressing is that should there be further
2 appeals you must take into account the effect of those delays.
3 Thank you Mr. May.

4 MR. MAY: Thank you, Your Honor.

5 MS. CHAITMAN: Good morning, Your Honor. I just want
6 to make one point. The settlement is not conditioned upon the
7 entry of the injunction. And I think that makes this case
8 unique because the 7.2 billion dollars has been forfeited and
9 would be available for distribution to creditors regardless of
10 whether this Court enters the injunction.

11 This is not the situation that Your Honor was faced
12 with last spring because at that point Mr. Sheehan indicated to
13 the Court that he would be coming back and asking for a
14 permanent injunction because he believed it was necessary in
15 order to consummate the settlement. That's not where we are
16 now. The money is in a bank ready to be distributed regardless
17 of whether this Court enters an injunction.

18 We believe the injunction is overbroad and improper.
19 We believe the Court does not have jurisdiction to enter it but
20 there's no need to enter the injunction. The estate cannot
21 show injury, no less irreparable injury, because regardless of
22 whether Your Honor enters the injunction the money is there to
23 distribute to creditors. The only problem is if Your Honor
24 enters the injunction we have no alternative but to appeal it
25 and that delays the distribution to creditors. We have no

1 interest in delaying distribution to creditors. And the Court
2 and the trustee should have no interest in protecting Mr.
3 Picower's entities from the liability that Mr. Picower created
4 as a result of his heinous crimes.

5 So on behalf of the 46.8 billion dollars of investor
6 losses that Mr. Picard does not represent --

7 THE COURT: You used the term heinous crimes, that's a
8 rather inflammatory statement. The Justice Department is
9 already involved here, you recognize that?

10 MS. CHAITMAN: I'm concluding heinous crimes, Your
11 Honor, based on the allegations that the trustee has made which
12 I accept for this purpose. He has alleged that Mr. Picower was
13 the coconspirator of Mr. Madoff and he outlined in his
14 complaint incident after incident --

15 THE COURT: That's not necessarily an attribution of
16 committing a heinous crime. I think you're rhetoric comports
17 with the rhetoric of the day and you might want to tone it
18 down.

19 MS. CHAITMAN: Your Honor, on behalf of the victims
20 that I represent the devastation that has been caused by this
21 scheme is truly heinous, it has --

22 THE COURT: Mr. Madoff is in jail for that.

23 MS. CHAITMAN: And Mr. Picower is being asked to be
24 relieved of any liability to all of my clients despite the
25 devastation he caused destroying generations of wealth, Your

1 Honor. And Mr. Picard is asking you to shield his entities
2 from liability for the personal claims that these people have
3 suffered. Thank you.

4 THE COURT: Mr. Sheehan?

5 MR. SHEEHAN: I do have a couple comments, Your Honor.
6 But there is a third party here who does want to be heard in
7 support of the application, Your Honor, with permission. It's
8 a --

9 THE COURT: Sure.

10 MR. SHEEHAN: Mr. Kurzman who's representing
11 orthopedic specialists who has a pension plan that filed a
12 claim in the case.

13 MR. KURZMAN: Good morning, Marc Kurzman from Sandak
14 Hennessey & Greco, Stamford Connecticut.

15 What Mr. Sheehan said is not exactly accurate. I
16 don't represent the plan I represent the 117 participants in
17 the Orthopedic Specialty Group Plan, a pension plan that was
18 created back in the 1970's for the employees of the Orthopedic
19 Specialty Group which is a Fairfield, Connecticut orthopedic
20 practice -- large Connecticut orthopedic practice.

21 The OSG Plan participants, my clients Your Honor,
22 include doctors, nurses, x-ray technicians, clerical support
23 staff, folks who invested their entire retirement savings in
24 BLMIS and were in many cases, Your Honor, financially wiped out
25 by the Madoff fraud. The participants in the OSG Plan, Your

1 Honor, my clients, include Dr. Henry Backe, a partner in the
2 OSG practice who has testified before the Senate Banking
3 Committee on the injustice of denying SIPC coverage to innocent
4 people who, like the OSG Plan participants, invested in BLMIS
5 through a federally sanctioned ERISA plan and were as victimized
6 by the Madoff fraud as those who held so-called direct claims
7 with BLMIS.

8 The trustee has approved the claim of the plan, Your
9 Honor, but has denied the individual claims filed on behalf of
10 all of my clients and I filed objections to that denial. I am
11 hopeful, Your Honor, that through further exploration of the
12 facts with the trustee or if need be ultimately a ruling by
13 this Court the OSG Plan participants will be afforded customer
14 status and SIPC coverage which, you know, despite the best
15 projections of the trustee is something that we believe would
16 be required in order to compensate my clients for their losses.

17 Nevertheless, Your Honor, I am here today to advise
18 the Court that I, as counsel to the OSG Plan participants and
19 Dr. Backe, are completely supportive of the settlement that the
20 trustee reached with the Picower defendants. We view the
21 settlement as serving a very -- as one that will serve a very
22 important source of recovery for the most seriously impacted
23 victims of the Madoff fraud, namely the so-called net losers,
24 the term that I know we're using in this case, which include
25 all of my 117 clients, Your Honor.

1 The settlement will clearly allow the trustee to take
2 a significant step in compensating the net losers for their
3 financial loss. You alluded, Your Honor, in your remarks to
4 the delay issue and that, of course, has been the major concern
5 of my clients, folks that had planned to retire, middleclass
6 folks, clerical people, x-ray technicians that now can't do
7 that because they no longer have a retirement savings. So
8 anything that can be done to expedite any payment to the net
9 losers is extraordinarily helpful to my clients and to the
10 class of which they're a part, the net losers. So I would urge
11 Your Honor to approve this settlement has been proposed by the
12 trustee in this motion. Thank you very much for your time,
13 Your Honor.

14 THE COURT: Thank you sir.

15 MR. SHEEHAN: Your Honor I'll be very brief, just
16 point by point.

17 I don't know how we could be more clear with our
18 intent, the order is perfectly clear. I don't know what the
19 confusion is. I think they're looking for something they're
20 not entitled to and that is that somehow they should be carved
21 out. They haven't established a record for that which leads to
22 the order that we did submit last night and why we think it is
23 appropriate. Even the language being alluded to by my
24 adversary in this sense, that if we had this hearing today on
25 the 9019 in the full record and nothing was presented to Your

1 Honor, this is our position, that would change Your Honor's
2 view of the so-called independent claims that exist in the
3 hands of Fox and Marshall. Well then that's something that the
4 Appellate Court should be aware of and it should be in the
5 order. But nothing's changed. They weren't independent then,
6 they're not independent now and therefore they should be
7 enjoined. So that's a finding I think is totally appropriate,
8 it serves judicial efficiency in the sense that Your Honor is
9 advising the Court of your findings here and even though
10 there's been a record here today that record shows nothing,
11 nothing in support of their position of independence.

12 Two other points --

13 THE COURT: Well on that point, Mr. Sheehan --

14 MR. SHEEHAN: Sure.

15 THE COURT: -- I agree with your reading of the
16 language and the central decretal paragraph that duplicative
17 and derivative claims being brought by the trustee are those
18 that are barred. I don't know why you need the second decretal
19 paragraph that speaks specifically to Fox and Marshall. They
20 are subsumed in the prior injunctive paragraph.

21 MR. SHEEHAN: Your Honor, if Your Honor reads it that
22 way, that's fine with us, we just thought it was good. As I
23 said, more judicial efficiency than anything else, make it
24 clear that no mat --

25 THE COURT: I think it is clear.

1 MR. SHEEHAN: Okay, fine Your Honor.

2 THE COURT: You state very clearly and I will state
3 very clearly if I approve this that there will be a permanent
4 injunction from asserting any claims against the Picower BLMIS
5 accounts or the Picower releases that is duplicative or
6 derivative of the claims brought by the trustee. And that's
7 exactly the same thing as what's in the next paragraph which
8 targets specifically Fox and Marshall. I don't see that
9 there's a need to have that extra paragraph when it's already
10 covered --

11 MR. SHEEHAN: Your Honor --

12 THE COURT: -- in the prior paragraph.

13 MR. SHEEHAN: -- I agree with you a hundred percent.
14 The --

15 THE COURT: Well I understand that too.

16 MR. SHEEHAN: You know, I've learned a few things
17 standing at this podium over the years and one of them is to
18 always agree with the judge.

19 The last point I was going to make, Your Honor, is
20 this, and that's when Ms. Jabin (ph.) said it's not necessary.
21 I don't know if that's the standard to begin with under Judge
22 Bernstein's wisdom or that of any other court addressing third
23 party injunctions.

24 What is important is this, is that that is an
25 incentive for Barbara Picower to come forward here and to make

1 the gesture that she's made, an incredible gesture, of coming
2 up with all this money. And therefore it's something that
3 she's entitled to look to as part of the bargain. And it's a
4 fair exchange that the estate receives all the money that it
5 does. Whether it's necessary or not is not the standard, the
6 fact is, is that is it appropriate? And we believe under all
7 the circumstances here that indeed it is appropriate.

8 And one last point because of the point made by Ms.
9 Jabin, she does not, I repeat, she does not represent forty-
10 four million dollars. Fox and Marshall are not class
11 representatives and unless she's representing all of the net
12 winners and she's representing all of the net losers, which she
13 is not the trustee is. The trustee represents every one of us.

14 THE COURT: But she is representing some on both
15 sides.

16 MR. SHEEHAN: She is that is true. She's wearing two
17 hats, I agree with that. But the point is, is that she is not
18 a Court appointed fiduciary as Mr. Picard is, mandated by
19 statute to represent each and every customer and creditor in
20 this case. He is indeed the uber-customer, he represents every
21 one of them and that's exactly what we're going to do in this
22 case is do our very best to satisfy every customer, winner,
23 loser, all of them. Thank you, Your Honor.

24 THE COURT: Thank you all.

25 MR. MAY: Just two seconds, Your Honor, if I may.

1 THE COURT: You're being timed.

2 MR. MAY: Well, okay. In that case five minutes.

3 I respect and appreciate some of the clarifications
4 but one of the issues we've always had is this word duplicative
5 as well. And that is, there is no doubt that the claims that
6 we are asserting in the Florida action relate to and arise out
7 of the BLMIS Ponzi scheme in a broad sense.

8 I don't know if anyone would interpret that to mean
9 that somehow our claims are duplicative, we do not believe they
10 are. But that language is somehow troubling to us because it
11 creates the possibilities down the road that people will argue
12 about that issue. And we don't want to argue about the issue.

13 What we had proposed and what we thought was clear and
14 understandable for everyone is that simply if the Appellate
15 Court would decide that our claims belong to us and not to the
16 estate then we're free to pursue them. That's what we're
17 asking for. I don't understand why that is such a big issue at
18 this point and why the trustee can't come out and say I agree
19 with that. That way we don't have to worry about whether a
20 particular second injunction somehow intrudes upon or expands
21 what happened on the preliminary injunction motion. And so for
22 that reason we would hope that language could be crafted that
23 would satisfy that issue. Thank you.

24 THE COURT: Thank you. Anybody else want to be heard?
25 I think there's no need to have any further clarification, any

1 language. It is very clear, especially with respect to the
2 objectors before me, that I can almost never satisfy their
3 positions and therefore there's always the threat of an
4 Appellate review, which I welcome. It's just that I'm
5 concerned about the broader grouping of people who are impacted
6 by everything that goes on here.

7 With respect to the three objections, I'm overruling
8 them I find them without merit. And I will take a little bit
9 of a position of Mr. May and not go into every last detail of
10 all the papers that were before me. I have gone through
11 everything. I've read all of the arguments; I fully understand
12 and comprehend the positions of the parties. I do find that
13 the omnibus reply to these objections sets forth with a
14 rational and clear persuasive basis for the grant of all of the
15 relief that's requested.

16 In essence I find the basis for each of the three
17 objections have been effectively rebutted in the reply. And
18 more than that from this morning's record and hearing it is
19 clear to this Court that has jurisdiction both under all the
20 trilogy of cases, Drier, Manville, Metromedia.

21 The purpose and the need for the injunction is quite
22 clear. The injunction is narrow. It deals with duplicative
23 and parallel claims of the trustee. Indeed there has never
24 been any showing of any privities between the objectors and the
25 Picower estate. Clearly there are many, many other targets for

1 the trustee's activities in bringing funds back into the
2 estate. The trustee's point and SIPC's point that the trustee
3 represents all of the Madoff victims including those that are
4 net winners and net losers; it's just a question of the
5 priority. And you cannot expect any settlor to make a
6 settlement with a potential possibility of being sued twice
7 over the same causes of action and claims.

8 Accordingly with the one exception I am prepared to
9 approve the settlement order with the injunction but I do not
10 see the need for the extra belt and suspenders of the paragraph
11 that specifically names Fox and Marshall. It is clear, to the
12 extent that they have the kinds of claims described here then
13 they would be enjoined. To the extent they don't then that's
14 another matter. That as Justice Sotomayor has said, is
15 something they can put into their own calculus and strategy
16 when they want to do any further planning.

17 The application is approved, Mr. Sheehan.

18 MR. SHEEHAN: Thank you, Your Honor. Your Honor, I do
19 have the order here but it has that paragraph in it. I can
20 clean it up and get it back down to your --

21 THE COURT: You should excise that particular
22 paragraph --

23 MR. SHEEHAN: I will have it to you this afternoon.

24 THE COURT: -- which I think is just redundant and
25 that's all.

1 MR. SHEEHAN: Yes, Your Honor, absolutely. Thank you,
2 Your Honor.

3 THE COURT: Thank you all.

4 MR. SHEEHAN: Thank you very much.

5 MS. CHAITMAN: Thank you, Your Honor.

6 (Whereupon these proceedings were concluded at 12:23 PM)

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I N D E X

R U L I N G S

DESCRIPTION	PAGE	LINE
Motion for Settlement Order with	41	17
Injunction -Approved with Noted Change		

C E R T I F I C A T I O N

I, Pnina Eilberg, certify that the foregoing transcript is a true and accurate record of the proceedings.

Pnina Eilberg

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